

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based)	
Services to Rural Areas and Promoting)	WT Docket No. 02-381
Opportunities for Rural Telephone Companies)	
To Provide Spectrum-Based Services)	
)	
2000 Biennial Regulatory Review)	
Spectrum Aggregation Limits)	WT Docket No. 01-14
For Commercial Mobile Radio Services)	
)	
Increasing Flexibility To Promote Access to)	
and the Efficient and Intensive Use of)	WT Docket No. 03-202
Spectrum and the Widespread Deployment of)	
Wireless Services, and To Facilitate Capital)	
Formation		

To: The Commission

**COMMENTS OF NEXTEL PARTNERS, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

By: Albert J. Catalano
Matthew J. Plache
Catalano & Plache, PLLC
Washington, DC 20007
(202) 338-3200 voice
(202) 338-1700 facsimile

Its Attorneys

Donald J. Manning, Vice President,
Secretary and General Counsel
Todd B. Lantor, Chief Regulatory Counsel
NEXTEL PARTNERS, INC.
4500 Carillon Point
Kirkland, WA 98033
Telephone: (425) 576-3660

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SUMMARY

Nextel Partners, Inc. (“Nextel Partners”) operates a wireless system under the “Nextel” brand name serving secondary, tertiary and rural markets. Nextel Partners is working actively to build out its system and expand its service in rural areas. Since its creation in 1999, Nextel Partners has built a system that currently covers more than 38,000,000 POPs.

The Commission’s marketplace initiatives are working well to facilitate Nextel Partners’ access to spectrum in rural areas. The Commission’s partitioning rules have allowed Nextel Partners to obtain hundreds of partitioned spectrum blocks that Nextel Partners utilizes to operate its system. In addition, Nextel Partners has obtained spectrum usage rights to thousands of station licenses under Commission-approved leasing arrangements.

Rather than adopting onerous “keep what you use” re-licensing mechanisms, there are additional steps that the Commission should take to facilitate deployment of wireless infrastructure in rural areas, including: (1) allowing grants of conditional security interests in spectrum usage rights to any lender; (2) working to facilitate the availability of RUS funding for narrowband wireless services in rural areas; and (3) continuing to make USF support available to wireless carriers. In addition, the Commission should encourage parties seeking spectrum in rural areas to pursue spectrum leasing arrangements.

Nextel Partners does not support the implementation of onerous take-back provisions for “unused” spectrum that has been previously licensed or auctioned by the Commission and that is subject to existing construction deadline requirements. An

attempt to implement such “keep what you use” re-licensing measures for previously auctioned spectrum without providing for just compensation would raise serious questions of legality under both the takings clause of the Fifth Amendment to the Constitution, as well as the Administrative Procedure Act. Moreover, such a radical shift in regulatory requirements would not serve the public interest and would instead jeopardize the ability of competitive carriers to build out rural areas by forcing them to divert resources in ways that would not otherwise be economically justified, for the purpose of protecting their existing spectrum investments.

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Nextel Partners, Inc. ("Nextel Partners"), by its attorneys, hereby files these comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ Nextel Partners is strongly committed to bringing wireless service to rural citizens and applauds the Commission's efforts to facilitate and speed the development of wireless mobile services to rural areas of the country. In the companion *Rural Report and Order*, the Commission takes positive steps towards

¹ *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, WT Docket No. 02-381; *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, WT Docket No. 01-14; *Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation*, WT Docket No. 03-202, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078 (2004) ("*Rural Report and Order*" or "*Further Rural NPRM*").

eliminating unnecessary regulatory impediments and promoting market-based mechanisms in ways that will help to facilitate the buildout of rural wireless infrastructure.

The Commission's license partitioning and spectrum leasing rules also are working well to help expedite the buildout of rural America. Nevertheless, there remain additional measures that the Commission should take in the current proceeding to strengthen the secondary spectrum market and to facilitate access to capital in order to help foster this buildout. These include: (1) allowing licensees to grant security interests in their spectrum usage rights under their respective licenses not only to the Rural Utility Service (RUS) but to any lender; (2) working to expand (and preserve) the availability of funds through RUS and the Universal Service Fund (USF) for the deployment of rural wireless infrastructure; and (3) clarifying that parties seeking spectrum in rural areas should actively pursue it through spectrum leasing and other marketplace opportunities.

Nextel Partners does not support adopting "keep what you use" re-licensing measures for existing licenses. Adopting new and onerous take-back provisions would be problematic from both a legal and policy perspective. Such an abrupt about-face in Commission policy would raise serious questions of legality under the Administrative Procedure Act as well as the Constitution, particularly with regard to auctioned spectrum. Rural build out is proceeding apace under the current rules and there is no reason to believe that a take-back re-licensing regime will hasten that progress. In fact, such a radical change in policy could encourage uneconomic investments that would be detrimental in the long run. Rather than imposing new coercive and burdensome conditions, the Commission should allow marketplace mechanisms freedom to do their

job, and should seek to improve these mechanisms by increasing access to capital and strengthening the secondary market.

I. Nextel Partners is Committed to Building and Expanding its System Throughout its Licensed Territory and Providing Service to Citizens Living in Rural Areas.

Nextel Partners was formed as a separate publicly-traded company in 1999 through a cooperative venture with Nextel Communications, Inc. (“Nextel Communications”) for the purpose of facilitating and expediting the buildout of wireless service to parts of the United States that are outside of the 100 largest metropolitan statistical areas (MSAs). Nextel Partners’ primary business focus is to provide digital wireless mobile communication services in mid-sized and smaller markets, including historically underserved and rural markets throughout the United States.

Through its cooperative arrangements with Nextel Communications, Nextel Partners brings to its customers in high cost rural areas and smaller markets the same national network and the same fully integrated four-in-one bundle of services available from Nextel Communications in urban areas. These services include (i) digital cellular, (ii) text/numeric messaging, (iii) Nextel Wireless Web services and (iv) Nextel Direct Connect digital two-way radio in a single phone. Nextel Partners provides these advanced digital wireless communications services over an industry leading 2.5G nationwide network. Pursuant to agreements between the companies, both Nextel Partners and Nextel Communications provide their services under the Nextel® brand name, and customers of both companies are provided cost-free roaming onto the other company’s network, so that both companies’ customers are afforded service over a seamless national network.

In addition to serving the residents of rural and secondary market areas, Nextel Partners provides mobile services to travelers in corridors along interstate and state highways. Along with Nextel Communications, Nextel Partners has also established strong ties with the Public Safety community to help meet the nation's emergency, public safety and national security needs. The combined Nextel/Nextel Partners system provides service to many police and fire departments and other first responders across the nation.

Since its inception as a startup entity in 1999, Nextel Partners has rapidly deployed an extensive network within its license service territory. During its first five years of operation, Nextel Partners completed the buildout of all of the medium-sized markets and many of the tertiary and rural areas within its licensed territory, as well as the major highway corridors running between populated areas. At the time of its formation in 1999, Nextel Partners served fewer than 50,000 customers in a small number of markets. Today, Nextel Partners serves over 1.3 million customers in 31 states, operates more than 4,000 cell sites and its system covers more than 38,000,000 POPs.

Despite achieving tremendous growth in a short period of time, Nextel Partners is aggressively continuing to expand its system and coverage within its licensed territory. While the company initially focused on building out the more populated areas in order to achieve sufficient customer numbers and hence the cash flow needed to arrive at a level of financial sustainability, Nextel Partners is now actively pushing coverage into more and more areas of low population density. During 2004, the company constructed over 450 new cell sites, increasing its total number of sites between 10-15%. 90% of these

sites were added for the purpose of expanding Nextel Partners' coverage footprint in less populated areas that were previously not covered, as opposed to increasing capacity within existing covered territory. Thus, while Nextel Partners does not currently cover its entire licensed territory, it is actively and diligently expanding its footprint within uncovered rural areas.

Nextel Partners' plans call for the continued expansion of its coverage in rural areas with cell site growth similar to that achieved in 2004. To help facilitate this expansion, Nextel Partners has recently applied for and been granted designation as an Eligible Telecommunications Carrier (ETC) in 15 states. As a result of these designations, Nextel Partners has begun to receive support from the Universal Service Fund (USF) that it is using in part to continue the expansion of its service territory in rural areas. In sum, Nextel Partners has diligently and successfully pursued the buildout of its licensed territory, and the company will continue to extend its coverage in rural and low population density areas with plans to continue this buildout for the foreseeable future.

II. The Commission's Partitioning Rules and Secondary Markets Policies Have Been Critical Elements in Fostering Nextel Partners Success.

In the *Further Rural NPRM*, the Commission seeks comment on the effectiveness of its partitioning, disaggregation, spectrum leasing and other market-based policies and rules in making wireless services available to more rural areas.² Based on its own experience, Nextel Partners believes that these rules and policies have been largely successful in accelerating rural buildout; they are at the root of Nextel Partners' success.

² *Further Rural NPRM* at ¶¶ 132, 148, 150.

As noted, the underlying motivation for the formation of Nextel Partners as a separate entity in 1999 was to facilitate and accelerate the buildout of a nationwide wireless system under the Nextel[®] brand name in less populated areas. While Nextel Communications has concentrated on building out the urban areas, Nextel Partners has focused on extending the Nextel[®] system into less populated and rural areas. Nextel Partners has undertaken this buildout in major part using economic area (EA) licenses originally purchased by Nextel Communications at auction from the Commission.

To a large extent, the creation of Nextel Partners and its operations were made feasible by the Commission's partitioning rules. During its first several years of operation, Nextel Partners obtained hundreds of partitioned EA licenses from Nextel Communications through a series of transfer of control transactions. Through this use of the Commission's partitioning rules, the parties were able to carve out areas of operation for Nextel Partners and to stage the purchase by Nextel Partners of licenses in a manner that optimized the operational imperatives and minimized the transactional and financing costs for both parties. Absent the ability to partition and transfer EA licenses, the formation of Nextel Partners as it presently exists would have been much more difficult and may not have been possible. The extensive buildout in less populated and rural areas that Nextel Partners has achieved to date, and is continuing to achieve, would not have been feasible in such a short timeframe. Accordingly, the Commission's partitioning rules have had an immediate and direct impact in facilitating the rapid expansion of Nextel[®] state-of-the-art wireless service in less populated and rural areas.

In addition, since the effective date of the Commission's spectrum leasing rules just under a year ago,³ Nextel Partners has, through Commission-approved long term *de facto* transfer leases entered into with Nextel Communications, obtained the use of spectrum authorized under thousands of separate station licenses. The utilization of this spectrum has allowed Nextel Partners to continuing expanding its service within its licensed territories, including rural areas. Accordingly, it is clear that the Commission's partitioning and spectrum leasing rules have worked well to facilitate Nextel Partners' access to spectrum. Nonetheless, as set forth below, there are additional steps the Commission could take to help facilitate the development of wireless infrastructure and services in rural areas of our nation.

III. The Commission Should Take Additional Steps to Facilitate the Availability and Reduce the Cost of Financing for Rural Wireless Build Out.

In the *Further Rural NPRM*, the Commission seeks comment on other methods it might adopt to help spur the deployment of rural wireless systems in situations where current market-based mechanisms fail.⁴ For competitive carriers such as Nextel Partners, a critical element of all cell site construction is the cost of financing. In order to remain competitive, capital expenditure on a proposed cell site must to a large degree be justified by the site's revenue generating potential, which in turn is related to the number of customers that the site will serve. If the cost of obtaining financing for site construction can be lowered, then capital expenditures for construction can be justified based on lower

³ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003) (hereafter, "*Secondary Markets First Report and Order*").

⁴ See *Further Rural NPRM* at ¶ 159.

numbers of customers. The equation is most sensitive to inputs based on financing costs in areas of lower population density that are at or just over the margin line for justification of site construction. These places tend to be in the most rural areas. Thus, by taking steps that will help to lower the cost of financing in these areas, the Commission can spur deployment of rural systems.

As discussed below, there are several steps the Commission can take to help lower the cost of obtaining financing in rural areas. These include: (i) allowing licensees to grant conditional security interests in spectrum usage rights to any lender, not just to RUS; (ii) working with the U.S. Department of Agriculture to expand the availability of RUS financing for rural wireless systems; and (iii) continuing to make USF support available to wireless carriers.

a. The Commission Should Allow the Grant of Conditional Security Interests in Spectrum Usage Rights to Any Lender.

The Commission has taken a positive step forward in allowing licenses to grant conditional security interests in spectrum usage rights to RUS.⁵ However, by limiting such grants only to RUS, the Commission misses an opportunity to create a strong market-based opportunity for reduced cost financing. Indeed, because of current limitations restricting the availability of RUS programs to broadband uses, many rural wireless carriers will receive no benefit from this change in policy. Therefore, as set forth in Section III (b) below, the Commission should adopt the policy goal of working with the U.S. Department of Agriculture (USDA) to implement regulatory and/or legislative changes to assure the expansion of RUS funding to a greater number of wireless services in rural markets. In addition, the Commission should extend its newly

⁵ *Rural Report and Order* at ¶ 51.

adopted security interest policy so that it covers grants of such conditional interests to any lender. Existing precedent as well as the Communications Act would support such an extension. Continuing to maintain a “bright line” distinction⁶ between RUS and other lenders for this purpose is both artificial and unnecessary.

As noted in the *Rural Report and Order*, while historically the Commission was restrictive in its policies towards market-oriented transactions, the Commission’s policies have evolved over time and now permit such transactions.⁷ The Commission allows the sale of unbuilt licenses, and allows the grant of security interests in the stock of the licensee, the physical assets used for operating the station, and in the proceeds from such operations.⁸ Additionally, the Commission allows the leasing of spectrum rights,⁹ and with the release of the *Rural Report and Order*, now allows the conditional grant of security interests in spectrum rights to RUS.

In adopting these various rules and policies, the Commission has recognized the concept of “spectrum usage rights” that arise under a license.¹⁰ While a licensee cannot “own” spectrum, it holds spectrum usage rights that are defined by the “terms, conditions and periods” of the license.¹¹ This development is consistent with Section 301 of the Communications Act, under which the Commission issues licenses providing “for the use of ... [radio channels] but not the ownership thereof, by persons for limited periods of

⁶ See *Id.* at ¶ 56.

⁷ See *Id.* at ¶¶ 48-49.

⁸ *Id.*

⁹ See *Secondary Markets First Report and Order*.

¹⁰ *Id.* at ¶ 32.

¹¹ *Id.*

time, under ... the terms conditions and periods of the license.”¹² Thus, the Act recognizes the distinction between ownership of the channel, which is not allowed, and the right to use the channel, which is allowed in accordance with the terms, conditions and periods of a license.¹³ The Commission has relied upon this distinction in adopting its market-oriented policies aimed at creating a market in spectrum usage rights.¹⁴

These spectrum usage rights are treated and recognized as a type of property right under the Commission’s recent orders. In 2002, the Spectrum Policy Task Force, in describing spectrum usage rights under an “exclusive use” model explained that these “rights resemble property rights in spectrum.”¹⁵ Subsequently, in citing to the Spectrum Task Force Report, the Commission identified exclusive use spectrum usage rights as “property-like rights.”¹⁶ By allowing the leasing of spectrum usage rights, and by allowing the limited grant to RUS of security interests, the Commission recognizes that spectrum usage rights are a form of property right.¹⁷ As noted, the Communications Act

¹² 47 U.S.C. § 301.

¹³ *Id.*

¹⁴ *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178, 24186-87 (2000) (hereafter, *Spectrum Markets Policy Statement*).

¹⁵ *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (November 2002) at 35.

¹⁶ *Interference Immunity Performance Specifications for Radio Receivers*, ET Docket No. 03-65, *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39, Notice of Inquiry, 18 FCC Rcd 6039 at n.21 (2003).

¹⁷ Indeed, if a licensee did not have a property interest in its spectrum usage rights it would not be able to grant a security interest in those rights to any party. See U.C.C. § 9.109 (a) (1), restricting applicability of Article 9 to security interests in “personal property or fixtures.”

countenances this development insofar as it recognizes a distinction between ownership of radio spectrum and the use of such spectrum.¹⁸

Thus, the Commission has the authority to allow licensees to grant security interests to lenders in spectrum usage rights without running afoul of the stricture against granting an ownership interest in the spectrum itself. The Commission observed in the *Rural Report and Order* that, “We recognize that one could argue that a grant of a security interest in an FCC license does not convey any ownership of spectrum, but rather ownership of the licensee’s private spectrum usage rights associated with the FCC license.”¹⁹ Without addressing this issue, however, the Commission rejected allowing grant of such security interests to any lender, stating, “However, after carefully considering whether this argument would support extending the relaxation of our security interest policy to non-United States lenders, we have decided to limit our action to RUS, as stated in the Rural NPRM.” The Commission should now expand this policy to all lenders. Such an action will help to lower the cost of capital in rural markets.

While the Commission notes that RUS is an agency of the United States, this in and of itself is not a determinative factor for the granting of security interests. Although Section 301 of the Communications Act provides for the exclusive ownership of spectrum by the United States, this would not prohibit grant of a security interest in *spectrum usage rights* to non-United States lenders. Historically, there was concern that the creation of a security interest in spectrum rights “could result in foreclosure and transfer of a license without FCC approval.”²⁰ This would be a relevant concern

¹⁸ 47 U.S.C. § 301.

¹⁹ *Rural Report and Order* at ¶ 56.

²⁰ *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746, 747 (9th Cir. 1998).

regardless of the identity of the lender. The Commission has addressed the concern by allowing only *conditional* grants of security interests, requiring that all financing documents include language making any transfer or assignment of rights under the license subject to Commission approval.²¹ A similar condition could be applied in the case of security interests granted to non-United States lenders to address this concern.

Similarly, while the Commission observes that it is unlikely that RUS would utilize a security interest to exercise inappropriate influence over licensees,²² there is no reason to believe that other lenders would be any less observant of Commission rules regarding influence and control. Lenders already can take security interests in proceeds of licenses, stock in licensed entities and operational assets employed in connection with licenses, and there is no evidence of widespread abuse of the Commission's rules and policies regarding inappropriate influence. The additional step of allowing lenders to take security interests in spectrum usage rights would present no greater incentive or opportunity to exercise inappropriate influence than already exists under current Commission policies.

In sum, in declining to allow non-United States lenders to take conditional security interests in spectrum usage rights, the Commission has missed a prime opportunity for facilitating access to lower cost capital that could help to fuel the buildout of service in rural areas. Since RUS programs currently are focused primarily on broadband uses, many wireless providers that provide narrowband services cannot obtain RUS funding for expansion of their networks in rural areas. Accordingly, while allowing the grant of security interests to RUS in spectrum usage rights is a positive step towards

²¹ *Rural Report and Order* at ¶ 51.

²² *Id.* at ¶ 57.

fostering development of rural wireless infrastructure, the positive benefits of this step will be largely restricted due to existing limitations in RUS programs. To realize the full benefits of this policy shift, the Commission should immediately extend its security interest policies to all lenders.

b. The Commission Should Take Further Steps to Facilitate Access to Capital From RUS and the USF to Support the Build Out of Rural Wireless Infrastructure.

Nextel Partners supports the Commission's efforts through the FCC/RUS Outreach Program to foster development of financing opportunities aimed at assisting in efforts to build out the rural wireless infrastructure. However, as discussed in Nextel Partners' earlier Comments and Reply Comments in this docket, the existing RUS loan program that benefits only rural telephone companies, and the RUS broadband initiative that benefits only broadband providers with high transmission rates do not sufficiently address the needs of rural consumers for competitive mobile voice services.²³ The restrictions applicable to the existing programs deny funding to numerous mobile services. Rules, policies and, if necessary, legislative changes should be implemented to authorize the RUS program to allow for a range of grants and loans at below market rates to wireless carriers for the provision of a wide array of narrowband, as well as broadband, mobile wireless services. Nextel Partners continues to urge the Commission to work with USDA, other agencies and Congress to make attaining this goal possible. RUS programs should aim to achieve the build out of the rural networks of wireless carriers in much the

²³ See Comments of Nextel Partners, Inc. on Notice of Proposed Rulemaking at pp. 9-12 (December 29, 2003); Reply Comments of Nextel Partners, Inc. at pp. 6-7 (January 26, 2004).

same way as the former Rural Electrification Administration (REA) programs assisted the build out of the rural LEC networks.²⁴

Nextel Partners also urges the Commission to continue to foster the support of wireless carriers through the Universal Service Fund. As noted above, Nextel Partners recently began receiving USF support; this support has become a critical element in helping to facilitate the expansion and maintenance of Nextel Partners' system in rural areas. As a result of this USF support, Nextel Partners has planned the construction of numerous new cell sites during 2005 that will expand Nextel Partners' footprint in rural areas. In many instances, construction of these cell sites would not have been feasible at the present time without USF support. Thus, the Commission's USF support programs are contributing directly and substantially to the expansion of wireless services in rural areas and it is critical that the Commission continue to foster such efforts.

IV. The Commission Should Take Additional Steps to Encourage Spectrum Leasing.

In the *Further Rural NPRM*, the Commission observes that, "based upon preliminary information regarding proposed spectrum leasing transactions, we are optimistic that our spectrum leasing rules are affording many new opportunities for

²⁴ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd 15280 at n.71 (1998) citing Antitrust & Communications Reform Act of 1994, House of Representatives Committee on the Judiciary, REPORT 103-559, Part 2 at 32 & n.43 at 32-33 ("in 1945 less than one-third of America's farms had telephone service.... To respond to the rural void left by the Bell System, Congress amended the Rural Electrification Act (REA) to authorize long-term, low-interest loans for telephone organizations to extend and improve rural service.") See also USDA website at: http://www.usda.gov/rus/telecom/rtb/index_rtb.htm ("By 1971, REA telephone loans had been made to build and improve 565,000 miles of telephone line serving approximately 8,000,000 residents in rural areas.")

access to spectrum, including spectrum in rural areas.”²⁵ Nevertheless, citing comments previously submitted in this docket by various parties representing rural Telcos, including OPASTCO/RTG and Blooston,²⁶ the Commission observes that the record suggests that there may be instances where spectrum leasing and other market-based opportunities “may not be adequate to promote access to spectrum in rural areas.”²⁷ Based on this observation, the Commission invites comment on whether it should adopt “keep what you use” re-licensing measures.

As set forth in Section V below, there are substantial legal and policy problems associated with the adoption of a “keep what you use” approach, particularly with regard to previously auctioned spectrum, that should dissuade the Commission from moving forward with such a policy change. In any event, it is far too early for the Commission to be considering a “keep what you use” approach, in light of the fact that spectrum leasing is still in its infancy, with the rules having been in effect for less than a year. Prior to exploring adoption of onerous regulatory measures, the Commission should allow more time for the development and maturing of market-place mechanisms, particularly spectrum leasing. By posing this question now, the Commission may send the wrong message to the market that could discourage widespread development of spectrum leasing—rural telcos may be encouraged to adopt a wait-and-see attitude, rejecting the pursuit of spectrum leasing opportunities in hopes that the Commission may enact

²⁵ *Further Rural NPRM* at ¶ 149.

²⁶ *Id.* at ¶ 150 citing OPASTCO/RTG Reply Comments at 5 and Blooston Comments at 11.

²⁷ *Id.* at ¶ 151.

measures that will allow them to obtain previously-auctioned spectrum when it comes up for re-licensing.

Nextel Partners has not been actively pursued during the past year by rural telcos seeking to lease spectrum. Thus, the comments of parties representing rural telcos suggesting that, “the current spectrum leasing rules provide little incentive for large licensees to effectuate leases with rural companies,”²⁸ are disingenuous. It cannot be concluded that spectrum licensees are rejecting viable opportunities to lease spectrum to rural telcos when rural telcos are not actively seeking to enter such leases. Similarly without merit is the suggestion that, “construction of wireless systems in rural areas is usually unnecessary to help larger licensees meet their ‘substantial service’ build-out requirements.”²⁹ Nextel Partners’ system construction is not designed merely to meet regulatory build out requirements, although it certainly takes them into account, but is instead dictated by the desire to expand its service territory and customer base in a manner that will earn revenue for its investors. Thus, Nextel Partners seeks ways to build out *all* of its service territory.

Finally, the suggestion that, “there will be ‘a number of situations’ where ‘carriers will need the certainty and permanence of licensee status’” that cannot be satisfied by a spectrum lease,³⁰ is speculative. Under the Commission’s spectrum leasing rules, a lessee can be granted all of the rights of the licensee for use of the licensed spectrum,³¹ for the full term of the license, as well as any renewal periods, subject only to the renewal

²⁸ *Id.* at ¶ 150 citing OPASTCO/RTG Reply Comments at 5.

²⁹ *Id.*

³⁰ *Id.*, citing Blooston Comments at 11.

³¹ *Secondary Markets First Report and Order* at ¶ 135 (stating, “licensees may lease any or all of their spectrum usage rights”).

of the license.³² Thus, the spectrum lessee is able to obtain the same degree of “permanence” under its lease as the licensee itself receives under its license.

Accordingly, the Commission should avoid steps that might encourage parties to refrain from seeking spectrum leases while continuing to promote development of a spectrum leasing market. To do so, the Commission should issue a firm and clear statement that parties seeking access to “unused” spectrum would be best advised to pursue market-place opportunities prior to asking the Commission to adopt coercive regulatory “fixes.”

V. The Commission Should Not Enact Coercive Take Back Provisions that Would Apply to Previously Licensed Spectrum.

In the *Further Rural NPRM*, the Commission seeks comment on the potential use of “keep what you use” re-licensing mechanisms under which the Commission would take back “unused” spectrum under a geographic license upon renewal.³³ While the Commission asked this question in the earlier Notice of Proposed Rulemaking in this proceeding, it had previously limited its inquiry on this issue only to future spectrum allocations; it now extends the inquiry to include all existing licensed terrestrial wireless services.³⁴ In the *Rural Report and Order*, the Commission declined to adopt new “keep what you use” take-back mechanisms for renewed licenses, deciding instead to allow newly adopted marketplace mechanisms a greater opportunity to work to achieve the

³² *Id.* at ¶ 107; *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503, at ¶ 151 (2004) (hereafter, “*Secondary Markets Second Report and Order*”)

³³ *Further Rural NPRM* at ¶ 154.

³⁴ *Id.*

goals of rural build out.³⁵ Nonetheless, the Commission now continues its inquiry into the efficacy of such measures.

The promulgation of renewal take-back mechanisms that may be applicable to already allocated spectrum raises substantial legal and policy issues. This is particularly true with regard to geographic area licenses purchased at auction. As discussed below, any attempt to take back spectrum usage rights under such licenses, other than in accordance with existing construction requirements, without providing just compensation to the licensee, would violate the APA and the Fifth Amendment to the Constitution. In addition, such a policy change would cause severe marketplace disruptions with no countervailing public interest benefits. Rather than adopting onerous take back provisions, the Commission should allow its recently promulgated secondary markets rules sufficient opportunity to work.

a. The Take Back of Previously Auctioned Spectrum Without Just Compensation to the Licensee Would Violate the Constitution and the APA.

The proposal to take back previously auctioned spectrum by means of a regulatory change, without providing monetary compensation or equivalent alternative spectrum, is unprecedented and legally unsupportable. Nextel Partners operates extensively on geographic licenses within the 800 MHz band. These licenses were purchased at auction and are subject to existing construction requirements. Under many of these licenses, Nextel Partners has been required to relocate incumbents that occupied the spectrum prior to the adoption of auction rules and has incurred significant costs in carrying out such relocations. Nextel Partners short-term and long-term operating plans

³⁵ *Rural Report and Order* at ¶ 37.

have been designed and implemented to take account of the costs of purchasing these licenses, the costs and timetable for completing any necessary incumbent relocations, and the costs and deadlines for meeting applicable construction requirements. Nextel Partners has made financial commitments based on these plans and the existing regulatory deadlines and requirements. The enactment of new and onerous take back provisions in the middle of the first licensing term that are contrary to the regulatory requirements relied upon by Nextel Partners in making its investments, would be akin to a classic “bait and switch” and would violate both the Constitution and the APA.

As discussed above, while licensees do not “own” their spectrum, the Commission has recognized that they do have a property-like interest in their spectrum usage rights under their licenses. The property-like nature of these spectrum usage rights is particularly poignant with regard to spectrum rights that were purchased at auction from the Commission. Nextel Partners’ spectrum usage rights under its existing 800 MHz licenses include a renewal expectancy right.³⁶ This renewal expectancy also is recognized as a property-like right³⁷ and is intended by the Commission “to encourage investment.”³⁸ Section 301 of the Communications Act specifically allows for this

³⁶ *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3 (n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services; Implementation of Section 309 (j) of the Communications Act – Competitive Bidding*, First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 at ¶ 63 (1995); and Second Report and Order, 12 FCC Rcd 19079 at ¶ 222 (1997).

³⁷ *See Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 628 (2000); *Instapage Network, Ltd.*, 17 FCC Rcd 19803 at ¶ 20 (2002).

³⁸ *Spectrum Markets Policy Statement* at ¶ 20.

renewal expectancy in referring to “terms, conditions and *periods*” of a license, clearly indicating the expectation of multiple and successive license periods.³⁹

Under the Fifth Amendment of the Constitution, the Commission cannot take away a property interest without just compensation.⁴⁰ Contrary to the dicta in the *Rural Report and Order*, there is a property interest in spectrum usage rights sufficient to trigger the takings protections of the Fifth Amendment.⁴¹ To the extent that the Commission seeks to take back spectrum usage rights that already have vested in accordance with existing construction requirements, it would be engaging in such a taking, particularly where it has previously sold these same rights at auction, and therefore the Commission would be obligated to compensate the effected licensee. Likewise, it would be a confiscatory taking in violation of the Fifth Amendment for the Commission to keep the proceeds paid by a winning bidder for the usage of spectrum within a geographic area, and then refuse to provide to the winning bidder the full spectrum usage rights purchased.⁴²

While the Commission does have the right to change its rules governing the terms of a license,⁴³ this right is not unlimited.⁴⁴ As courts have recognized, “Traditional

³⁹ 47 U.S.C. § 301.

⁴⁰ U.S. Constitution, Amendment V.

⁴¹ *Rural Report and Order* at ¶ 84.

⁴² See *Longshore v. U.S.*, 77 F.3d 440, 444 (Fed. Cir. 1996), citing *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). See also *St Joseph Stock Yards v. U.S.*, 298 U.S. 38, 54 (1936) (acknowledging that a rate set by a regulatory commission could be confiscatory if set so unreasonably low as to deprive a carrier of its constitutional right of compensation).

⁴³ See *Id.*

⁴⁴ See *Salazar v. FCC*, 778 F.2d 869, 876 (D.C. Dir. 1985).

concepts of due process [are] incorporated into administrative law.”⁴⁵ Indeed, even in the absence of any property rights, the Commission has recognized that, “procedural due process rights inherent in the APA attach when the Commission changes the terms or conditions or a permit or license.”⁴⁶ Due process requires that prior to making such a change that will have a detrimental effect on a licensee, the Commission must provide adequate and sufficient notice.⁴⁷ Having sold spectrum at auction to licensees that made their purchases based upon specific build out requirements incorporated into the terms and conditions of the auctioned licenses, the Commission cannot shortly thereafter enact rules that would shortchange these licensees from the spectrum usage rights, including the renewal expectancy that they purchased.

In sum, a take back of spectrum as described in the *Further Rural NPRM* would violate the due process protections and fundamental fairness requirements embodied in the Constitution and protected by the Administrative Procedure Act. At a minimum, any attempt to implement rules in this fashion would result in years of litigation and uncertainty with disruption to the marketplace that ultimately would negatively impact the goal of bringing wireless service to rural areas.

b. Adopting Renewal Take Back Measures for Already Licensed Spectrum Would Not Serve the Public Interest.

Even assuming *arguendo* that the Commission has the lawful authority to adopt new take back provisions applicable to existing licensees, such a change in policy would

⁴⁵ *Satellite Broadcasting Company v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

⁴⁶ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 14 FCC Rcd 17525 at n.38 (1999).

⁴⁷ *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1336 (D.C. Cir. 2004) (the Commission cannot proclaim such changes to its rules “on the fly”).

severely disrupt the market without countervailing public interest benefit. Nextel Partners' business plan has been designed based on existing regulatory dictates as well as marketplace mandates. Nextel Partners has taken these factors into account, and particularly has relied upon existing regulatory requirements, in planning its build out and entering into financial commitments to obtain the working capital needed to fund that build out. Abruptly changing existing regulatory requirements to include "keep what you use" re-licensing measures would cause a radical shift in the paradigm upon which Nextel Partners has based its business model.

If faced with the prospect of having to accelerate the build out all of its licensed territory or permanently losing spectrum rights, Nextel Partners would be forced to divert resources in ways that likely would not be economically justified under current market conditions in order to fulfill such a new and burdensome build out requirement. This would severely disrupt the efficacy of its existing business model and likely jeopardize its existing financial commitments. Ultimately, the result would not be beneficial in terms of facilitating the expansion of wireless service in rural areas.

Moreover, such a change would not provide any public interest benefit. Indeed, no record has been established supporting the notion that reclamation of any segment of "unused" rural spectrum would result in accelerating the build out of service to rural areas. As noted above, rural telcos generally are not taking advantage of existing rules that would allow them to obtain use of spectrum through leases. Thus, it would appear that those entities have no pressing need for use of that spectrum. On the other hand, Nextel Partners has established a solid record of building out and expanding wireless service in rural areas, with plans to continue the expansion of coverage in rural areas into

the foreseeable future. Rather than taking spectrum away from existing licensees that are actively and successfully building competitive systems to bring service to rural areas, the Commission should instead seek ways to support the efforts of these licensees through marketplace mechanisms and expanded access to capital.

In sum, the threat of a confiscatory taking is not the best means to encourage additional marketplace investment in rural areas. It will only bring about uncertainty and added risk that will undermine efforts to bring service to rural areas, with no countervailing public interest benefit.

CONCLUSION

In view of the foregoing, Nextel Partners respectfully requests that the Commission take action consistent with the views expressed herein.

Respectfully submitted,

NEXTEL PARTNERS, INC.

By: (s) Albert J. Catalano

Albert J. Catalano
Matthew J. Plache
Catalano & Plache, PLLC
Washington, DC 20007
(202) 338-3200 voice
(202) 338-1700 facsimile

Its Attorneys

Donald J. Manning, Vice President,
Secretary and General Counsel
Todd B. Lantor, Chief Regulatory Counsel
NEXTEL PARTNERS, INC.
4500 Carillon Point
Kirkland, WA 98033
Telephone: (425) 576-3660

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